FILE COPY

FILED
DEC 16 1930
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM—1930.

No. 87.

SETH M. MILLIKEN, GERRISH H. MILLIKEN and HAROLD A. HATCH, as Executors of the Last Will and Testament of Seth M. Milliken, deceased,

Petitioners,

v.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF FOR PETITIONERS.

D. A. EMBURY,
Attorney for Petitioners,
63 Wall Street,
New York, N. Y.

HUGO KOHLMANN,
CURTIS, MALLET-PREVOST, COLT & MOSLE,
Of Counsel.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

TABLE OF CONTENTS.

	PAGE
Opinion Below	1
Jurisdiction	1
Issue Involved	2
Statutes Involved	2, 61
Assignments of Error	3
Statement of Facts	3
Outline of Argument	6
POINT I. Section 402(c) of the Revenue Act of 1918, construed in the light of recent decisions, does not apply to the transaction here at issue	7
POINT II. Section 402(c) of the Act, if construed to tax a transfer made before the passage of the Act, is unconstitutional. The decision of this Court in *Nichols* v. *Coolidge* holding this Section invalid as to such a transfer intended to take effect in possession or enjoyment at or after death applies *a fortiori* to a transfer made in contemplation of death	15
POINT III. The retroactive application of Section 402(c) of the 1918 Act to transfers in contemplation of death made prior to the effective date of that Act cannot be supported as a necessary adjunct to the enforcement of the general provisions of the statute taxing the net estates of decedents	25

PAGE

POINT IV. In any event, the provisions of the Act fixing the measure of the tax on transfers under Section 402(c) are so arbitrary and capricious as to violate the Fifth Amendment 30

POINT V. The retroactive application of Section 402(c) amounts to an unapportioned direct tax forbidden by Sections 2 and 9 of Article I of the Constitution 38

POINT VI. The applicability of the principles enunciated by this Court in *Nichols* v. *Coolidge* is not affected by the fact that the transfer in the present case was made subsequent to the passage of the 1916 Act 42

POINT VII. The saving clause contained in Section 1400(b) of the 1918 Act does not operate to impose a tax upon the transaction here in question 47

POINT VIII. The repeal of the Revenue Acts of September 8th, 1916, March 3rd, 1917, and October 3rd, 1917, coupled with the enactment of the Act of February 24th, 1919, containing analogous taxing provisions but at different rates, cannot be so construed as to relieve the later Act from the taint of retroactivity when applied to a transfer completed prior to its adoption 52

Conclusion 60

TABLE OF AUTHORITIES.

Cases Cited.

	Page
Almy *v.* California, 24 How. 169	41
Anderson *v.* McNeir, 16 Fed. (2nd) 970; reversed on confession of error, 275 U. S. 577	19
Arenac County *v.* Iosco County, 158 Mich. 344	18
Barclay Co. Inc. *v.* Edwards, 267 U. S. 442	18, 32
Bear Lake, etc., Co. *v.* Garland, 164 U. S. 1	53, 56
Blodgett *v.* Holden, 275 U. S. 142	14, 19, 42
Bradley *v.* Nichols, 13 Fed. (2nd) 857; affd. 27 Fed. (2nd) 47	33
Brady *v.* Ham, C. C. A. 1st Circuit No. 2459, decided Nov. 26, 1930, not yet reported	8, 42
Brown *v.* Maryland, 12 Wheat. 419; 25 U. S. 554	41, 42
Brushaber *v.* Union Pacific R. R. Co., 240 U. S. 1	17
Campbell *v.* California, 200 U. S. 87	18, 52, 53
Carroll *v.* Greenwich Insurance Co., 199 U. S. 401	18
Carter *v.* Witcomb, 74 N. H. 482	18
Chase National Bank *v.* United States, 278 U. S. 327	8, 9, 42
Collateral Inheritance Tax, *In re*, 88 Me. 587	18
Commissioner *v.* Northern Trust Co., 41 Fed. (2nd) 732	7, 9, 23, 42
Commonwealth *v.* McCauley's Executors, 166 Ky. 450	18
Commonwealth *v.* Wellford, 114 Va. 372	18
Cook *v.* Pennsylvania, 97 U. S. 566	41
Coolidge *v.* Loring, 235 Mass. 220	23
Coolidge *v.* Nichols, 4 Fed. (2nd) 112; affd. 274 U. S. 531	23
Cooper *v.* United States, 280 U. S. 409	21
Dane *v.* Jackson, 256 U. S. 589	18
Dawson *v.* Kentucky Distilleries Co., 255 U. S. 288	40, 41

PAGE

Erskine *v.* White, D. C. Mass. Dist. No. 4272, decided Oct. 1, 1930, not yet reported 23
Eury's Executors *v.* State, 72 Ohio St. 448 18

Farmers Loan & Trust Co. *v.* Bowers, 29 Fed. (2nd) 14 23
Flanigan *v.* Sierra County, 196 U. S. 553 ..... 46, 49
Flannery *v.* Willcuts, 25 Fed. (2nd) 951 47
Flint *v.* Stone Tracy Co., 220 U. S. 107 39
Forbes Boat Line *v.* Board of Commissioners, 258 U. S. 338 42
Frew *v.* Bowers, 12 Fed. (2nd) 625; certiorari dismissed, 275 U. S. 578 ..... 25, 31, 32, 38, 42

Gulf, etc. Railway *v.* Dennis, 224 U. S. 503 53
Gulf, etc. Railway *v.* Ellis, 165 U. S. 150 ..... 18, 55, 56

Hanna *v.* United States, 68 Ct. Cls. 45; certiorari denied, 280 U. S. 612 47
Hartman *v.* Greenhow, 102 U. S. 672 ..... 18, 31
Henderson Bridge Co. *v.* Henderson City, 173 U. S. 592 19
Hertz *v.* Woodman, 218 U. S. 205 49
Hill *v.* Nichols, 18 Fed. (2nd) 139 33
Hodgkins *v.* Commissioner, C. C. A., 7th Circuit No. 4178; decided Oct. 16, 1930; not yet reported 7, 9, 23, 42
Hunt *v.* Wicht, 174 Cal. 205 18

Kansas City Railway *v.* Kansas, 240 U. S. 227 40
Knowlton *v.* Moore, 178 U. S. 41 ..... 17, 25, 30, 31
Knox *v.* McElligott, 258 U. S. 546 58

Lacy *v.* Treasurer, 152 Ia. 477 18
Langdon, *Matter of*, 153 N. Y. 6 18
Lansing, *Matter of*, 182 N. Y. 238 18
Levy *v.* Wardell, 258 U. S. 542 ..... 17, 34, 37, 40, 42, 58
Lewellyn *v.* Frick, 268 U. S. 238 37

PAGE

McCardle, *ex parte*, 7 Wall. 506 46
McCaughn *v.* Carnill, 43 Fed. (2nd) 69 ..... 7, 9, 23, 42
McNeir *v.* Anderson, 275 U. S. 577 ..... 19, 42
Mahan *v.* Plank, 289 Fed. 722 27
Maxwell *v.* Bugbee, 250 U. S. 525 18
May *v.* Heiner, 281 U. S. 238 ..... 7, 9, 23, 42
Murphy *v.* Utter, 186 U. S. 95 58

National Paper & Type Co. *v.* Bowers, 266 U. S. 373 18
Nichols *v.* Bradley, 27 Fed. (2nd) 47 33
Nichols *v.* Coolidge, 274 U. S. 531,
15, 19, 23, 24, 26, 33, 37, 42, 43

Page *v.* Skinner, 298 Fed. 731; certiorari denied, 266 U. S. 625 ..... 46, 47, 58
Pana *v.* Bowler, 107 U. S. 529 58
Pell, *Matter of*, 171 N. Y. 48 18
Pollock *v.* Farmers Loan & Trust Co., 158 U. S. 601 16

Rafferty *v.* Smith Bell & Co., 257 U. S. 226 29
Reinecke *v.* Northern Trust Co., 278 U. S. 339,
8, 9, 10, 23, 25, 42

Saltonstall *v.* Saltonstall, 276 U. S. 260 34
Schlesinger *v.* Wisconsin, 270 U. S. 230 ..... 25, 29
Shukert *v.* Allen, 273 U. S. 545 24
Shwab *v.* Doyle, 258 U. S. 529 ..... 13, 58, 59
South Carolina *v.* United States, 39 Ct. Cls. 257; affd. 199 U. S. 437 39
Spangler's Estate, 281 Pa. St. 118 ..... 12, 18
Stanford, Estate of, *v.* California, 126 Cal. 112 53
State *v.* Safe Deposit & Trust Co., 132 Md. 251 18
Stauffer, Succession of, 119 La. 66 18
Steamship Co. *v.* Joliffe, 2 Wall. 450 ..... 53, 54, 56

Taft *v.* Bowers, 278 U. S. 470 21
Thames & Mersey Insurance Co. *v.* United States, 237 U. S. 19 42
Thomas *v.* United States, 192 U. S. 363 39
Tozer *v.* Probate Court, 102 Minn. 268 18

PAGE

Union Trust Co. *v.* Wardell, 258 U. S. 537 58
United States *v.* American Sugar Refining Co., 202 U. S. 563 29
United States *v.* Burr, 159 U. S. 78 29
United States *v.* Heinszen, 206 U. S. 370 29
United States *v.* Hvoslef, 237 U. S. 1 41
United States *v.* Tynen, 11 Wall. 88 58
Untermyer *v.* Anderson, 276 U. S. 440 ..... 19, 26, 42, 44

Welton *v.* Missouri, 91 U. S. 275 41
Wilmington Trust Co. *v.* United States, 28 Fed. (2nd) 205 46
Wright *v.* Oakley, 5 Met. 406 ..... 53, 54

STATUTES PRINTED.

Revenue Act of September 8, 1916, 39 Stat. 777-778,
Sec. 201 61
Sec. 202 61

Revenue Act of March 3, 1917, 39 Stat. 1002,
Sec. 300 62
Sec. 301 62

Revenue Act of October 3, 1917, 40 Stat. 324-325,
Sec. 900 62

Revenue Act of February 24, 1919 (Revenue Act of 1918), 40 Stat. 1096-1101, 1149,
Sec. 401 63
Sec. 402(c) 63
Sec. 409 64
Sec. 1400(a) 64
Sec. 1400(b) 65

Statutes Cited.

PAGE

Judicial Code—Act of November 13, 1925, Chap. 229, Sec. 3, 43 Stat. 939 1

Revenue Act of September 8, 1916 ..... 43, 45, 46, 47, 48, 50, 52, 56, 58, 59

Revenue Act of March 3, 1917 ..... 43, 46, 47, 50, 52, 58, 59

Revenue Act of October 3, 1917 ..... 43, 46, 47, 52, 58, 59

Revenue Act of February 24, 1919,
Sec. 401 ..... 8, 11, 12
Sec. 402(c) 7, 8, 10, 12, 14, 15, 16, 24, 43, 46, 48, 59, 60
Sec. 409 37
Sec. 1400 ..... 44, 46, 47, 50, 52, 57

Revenue Act of 1918,
Sec. 113, 45 Stat. 818 21

Regulations Quoted.

Regulations 63, Art. 18 2
Regulations 74, Arts. 593, 595 21

Miscellaneous Citations.

26 Columbia Law Review 852 39
Endlich: Statutory Construction 49
37 Harvard Law Review 694 ..... 38, 39
Lewis's Sutherland: Statutory Construction 49

Supreme Court of the United States

OCTOBER TERM—1930.

No. 87.

SETH M. MILLIKEN, GERRISH H. MILLIKEN and HAROLD A. HATCH, as Executors of the Last Will and Testament of Seth M. Milliken, deceased,

Petitioners,

v.

THE UNITED STATES OF AMERICA.

BRIEF FOR PETITIONERS.

Opinion Below.

The opinion of the Court of Claims (R. 14) is printed in 69 Ct. Cls. 231 and also in 38 Fed. (2nd) 381.

Jurisdiction.

Judgment of the Court of Claims was entered February 17th, 1930 (R. 29). Petition for Writ of Certiorari to review the judgment of the Court of Claims was filed April 19th, 1930, and was granted October 13th, 1930. Jurisdiction is conferred by Section 3(b) of the Act of February 13th, 1925 (43 Stat. 939).

The Issue.

The case presents two questions for consideration:

(1) Should Section 402(c) of the Revenue Act of 1918 be so construed as to include, as a part of the net estate of a decedent dying in 1920, at its value at the time of his death and subject to tax at the rates provided by said 1918 Act, property transferred by the decedent in contemplation of death in December, 1916, over three years prior to his death and over two years prior to the passage of the Act under which the tax is sought to be imposed?

(2) If the answer to the first question be in the affirmative, do the provisions of the Act purporting to tax such transaction upon the basis of the values and at the rates therein provided violate the provisions of the Constitution of the United States and amendments thereto?

Statutes Involved.

The pertinent provisions of the Revenue Act of 1918 and the corresponding or analogous provisions of the Act of September 8th, 1916, the Act of March 3rd, 1917, and the Act of October 3rd, 1917, are set forth in the appendix hereto (pp. 61-65).

The phrase "in contemplation of death", while not defined in any of the statutes, is defined in Article 18 of Regulations 63 under the 1918 Act as follows:

> "Art. 18. Nature of transfer. The words 'in contemplation of death' do not mean, on the one hand, a general expectation of death such as all persons entertain, nor, on the other, is the meaning limited to an expectation of immediate death. A transfer,

however, is made in contemplation of death wherever the person making it is influenced to do so by such an expectation of death, arising from bodily or mental conditions, as prompts persons to dispose of their property to those whom they deem proper objects of their bounty. * * *"

Assignments of Error.

I. The Court of Claims erred in construing Section 402(c) of the Revenue Act of 1918 as purporting to impose a tax on the transaction here in question.

II. The Court of Claims erred in holding that the provisions of said Section 402(c) of the Revenue Act of 1918, if construed so as to tax the transaction here in question, were not arbitrary and capricious and in violation of the provisions of the Fifth Amendment to the Constitution of the United States.

III. The Court of Claims erred in holding that the provisions of said Section 402(c) of the Revenue Act of 1918, if construed so as to tax the transaction here in question, were not in violation of the provisions of the third clause of Section 2 and the fourth clause of Section 9 of Article I of the Constitution of the United States.

IV. The Court of Claims erred in entering judgment in favor of the United States.

Statement of Facts.

Petitioners are the duly qualified executors of the last Will and Testament of the decedent, Seth M. Milliken, who died a resident of the City and State of New York March 5th, 1920 (R. 15). In December, 1916, over three years

prior to his death, decedent had transferred by way of gift to his three children 2,713 shares of the capital stock of Minot Mills, Inc., 1,000 shares to his son, Gerrish H. Milliken, 1,000 shares to his son, Dr. Seth M. Milliken, and 713 shares to his daughter, Margaret M. Hatch (R. 15). In the estate tax returns originally filed by the executors, these shares were shown under Schedule E as a transfer made more than two years prior to death without consideration but not believed to have been in contemplation of or intended to take effect in possession or enjoyment at or after death. They were not included in such returns as a part of the taxable estate (R. 15) and the tax of $1,552,640.27 originally paid under such returns (R. 12) was exclusive of any tax on these shares.

Subsequently, the Commissioner redetermined the tax, found that the transfer in question was one made in contemplation of death, made several adjustments as to minor details not here involved and assessed an additional tax of $830,917.24, of which amount the sum of $812,165.42 resulted from the inclusion in the taxable estate of the decedent of the shares in question at their value at the time of decedent's death, which value the Commissioner found to be $3,308,720.54 (R. 15).

The additional tax so assessed was paid by the petitioners on March 10th, 1926 (R. 15). Claim for Refund of said sum of $812,165.42 was duly filed and rejected (R. 16) and suit was brought in the Court of Claims for the recovery of said sum, together with interest from the 10th day of March, 1926 (R. 10). The Court of Claims found that the tax was properly assessed and collected, and accordingly entered judgment dismissing the Petition (R. 29). The case is here on certiorari to review the judgment of the Court of Claims.

The attendant circumstances surrounding and leading up to the gift of the stock in 1916 were fully set forth in the Stipulation of Facts filed in the Court below. However, in connection with the proceedings before that Court and as a part of such Stipulation of Facts, the plaintiffs waived any right to contest the finding of the Commissioner that the gift was made in contemplation of death (R. 15). The Court, in its special findings of fact, instead of setting forth all the facts as stipulated, saw fit to paraphrase and condense the Stipulation, omitting all the special circumstances surrounding the gift and contenting itself with pointing out that plaintiffs had waived any right to assert that the transfer in question was not, as a matter of fact, a transfer by the decedent in contemplation of death.

This undoubtedly is sufficient for all the purposes with which we are here concerned except, perhaps, that it should be noted that the determination of the Commissioner of Internal Revenue that the transfer was made in contemplation of death, the right to contest which determination was waived by the petitioners, amounted only to a finding that the transfer was actuated "by such an expectation of death, arising from bodily or mental conditions, as prompts persons to dispose of their property to those whom they deem proper objects of their bounty" as provided by Article 18 of the Commissioner's Regulations 63 then in effect, and that there is nothing in the facts of the case tending to indicate that the gift was in any manner influenced by considerations of inheritance tax liability or was in any sense a part of any attempt to evade taxes.

Argument.

For purposes of convenience, the points of the petitioners' argument will be considered *seriatim* in the order in which the several points involved are considered in the Opinion of the Court of Claims:

I. Section 402(c) of the Revenue Act of 1918, construed in the light of recent decisions, does not apply to the transaction here at issue.

II. Section 402(c) of the Act, if construed to tax a transfer made before the passage of the Act, is unconstitutional. The decision of this Court in *Nichols* v. *Coolidge* holding this Section invalid as to such a transfer intended to take effect in possession or enjoyment at or after death applies *a fortiori* to a transfer made in contemplation of death.

III. The retroactive application of Section 402(c) of the 1918 Act to transfers in contemplation of death made prior to the effective date of that Act cannot be supported as a necessary adjunct to the enforcement of the general provisions of the statute taxing the net estates of decedents.

IV. In any event, the provisions of the Act fixing the measure of the tax on transfers under Section 402(c) are so arbitrary and capricious as to violate the Fifth Amendment.

V. The retroactive application of Section 402(c) amounts to an unapportioned direct tax forbidden by Sections 2 and 9 of Article I of the Constitution.

VI. The applicability of the principles enunciated by this Court in *Nichols* v. *Coolidge* is not affected by the fact that the transfer in the present case was made subsequent to the passage of the 1916 Act.

VII. The saving clause contained in Section 1400(b) of the 1918 Act does not operate to impose a tax upon the transaction here in question.

VIII. The repeal of the Revenue Acts of September 8th, 1916, March 3rd, 1917, and October 3rd, 1917, coupled with the enactment of the Act of February 24th, 1919, containing analogous taxing provisions but at different rates, cannot be so construed as to relieve the later Act from the taint of retroactivity when applied to a transfer completed prior to its adoption.

POINT I.

Section 402(c) of the Revenue Act of 1918 construed in the light of recent decisions does not apply to the transaction here at issue.

In the Court below, petitioners advanced the arguments hereinafter set forth respecting the constitutionality of Section 402(c) of the Revenue Act of 1918 but did not question the construction placed upon said Section by the Commissioner of Internal Revenue as having been intended by Congress to apply to a state of facts such as here presented (R. 17).

Since the case was there briefed and argued, however, this Court, in *May* v. *Heiner,* 281 U. S. 238, 50 Sup. Ct. Rep. 286, and two Circuit Courts of Appeals in *Commissioner* v. *Northern Trust Co.,* 41 Fed. (2nd) 732, *McCaughn* v. *Carnill,* 43 Fed. (2nd) 69, and *Hodgkins* v. *Commissioner* (C. C. A., 7th Circuit, No. 4178, decided October 16, 1930, not yet reported), have clearly indicated that transfers "intended to take effect in possession or enjoyment at or

after death", as referred to under Section 402(c), are taxable only if and to the extent that the "interest" taxed passes from the possession, enjoyment, and control of the donor at his death and so constitutes a transfer taxable under Section 401. See also *Brady* v. *Ham* (C. C. A., 1st Circuit, No. 2459, decided Nov. 26, 1930, not yet reported.

This Court had previously pointed out in *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 348, that the only Section of the Act imposing the tax (Section 401) does so on the "net estate" of a decedent and that all the items required by Section 402 to be brought into the gross estate for the purpose of computing the tax, unless the items enumerated in Section 402(c) constitute an exception, consist of property passing out of the control, possession, or enjoyment of the decedent at his death. In that case, in *Chase National Bank* v. *United States*, 278 U. S. 327, and in the four cases first above cited, it has been consistently held that interests with respect to which decedent has created a trust to take effect in possession or enjoyment at or after death as mentioned in Section 402(c) do not constitute an exception to this general rule.

In the Reinecke case, this Court said (p. 348):

> "In the light of the general purpose of the statute and the language of §401 explicitly imposing the tax on net estates of decedents, we think it at least doubtful whether the trusts or interests in a trust intended to be reached by the phrase in §402(c) 'to take effect in possession or enjoyment at or after his death' include any others than those passing from the possession, enjoyment or control of the donor at his death and so taxable as transfers at death under §401. That doubt must be resolved in favor of the taxpayer."

And in *Chase National Bank* v. *United States, supra,* this Court further emphasized the point that the distinguishing feature of taxability is "the donor's bestowal of benefits on another *at death*" and the retention of "control over those benefits with power to direct their future enjoyment *until his death*". (Italics throughout this brief, with the exception of foreign phrases, unless otherwise indicated, are ours.)

In the Reinecke and Chase Bank cases this principle was applied so as to include in the taxable estate, in the one case, the interests under trusts created by the decedent in which he had reserved exclusive power of revocation, and, in the other case, insurance policies taken out by the decedent on his own life in which he had reserved the right to change the designated beneficiary, but so as to exclude from the taxable estate (in the Reinecke case) the interests under trusts in which the right to alter or modify the provisions thereof reserved by the decedent trustor was subject to exercise only by joint action with one or more beneficiaries.

In *May* v. *Heiner, supra,* the trust was to pay the income to the settlor's husband for life, then to the settlor for life, with remainders over; in *Commissioner* v. *Northern Trust Co., supra,* the trust was to pay to the settlor for life, then to children for their respective lives, with remainders over; and in *McCaughn* v. *Carnill* and *Hodgkins* v. *Commissioner, supra,* the trusts were to pay to settlor for life, then to the widow for life, then to children for life, with remainders over. This Court in the May case and the Circuit Courts of Appeals in the other two cases last mentioned, applied the same principle enunciated in the Reinecke and Chase Bank cases and held that, since no interest passed

from settlor to the beneficiaries under the trusts by virtue of the settlor's death, there was no tax.

It seems clear that in all these cases the remaindermen did not acquire "possession or enjoyment" of the property until "at or after" the death of the grantor. On the other hand, the life interest retained by the grantor was not the interest which passed to the remaindermen when the grantor died. That interest "was obliterated by that event". The interest of which the remaindermen received possession and enjoyment upon the death of the grantor had been transferred by the grantor beyond power of recall long before death and at the time of the execution of the trust instrument involved. It therefore formed no part of the actual "net estate" of the decedent as defined by this Court in the Reinecke case and it consequently was held not taxable under Section 402(c).

These decisions in respect of transfers intended to take effect in possession or enjoyment at or after death under Section 402(c) apply with equal force to transfers in contemplation of death under the same Section. The phraseology of this Section clearly indicates that Congress considered gifts in contemplation of death and gifts intended to take effect in possession or enjoyment at or after death in the same category and intended that they should be in all respects similarly treated. The clause in question reads:

> "To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, *in contemplation of or intended to take effect in possession or enjoyment at or after his death* (whether such transfer or trust is made or created before or after the passage of this Act), * * *"

Here we have not one paragraph treating of transfers in contemplation of death and another paragraph treating of transfers intended to take effect in possession or enjoyment at or after death, not even two separate clauses in the same paragraph, but both thoughts expressing alternative methods of accomplishment woven together in a single phrase, both uttered in the same breath, the one not even set off from the other by so much as a single comma—"*in contemplation of or intended to take effect in possession or enjoyment at or after death*". If there be any language clearer, more forcible, and more free from ambiguity that Congress could have used for the purpose of indicating that these alternative forms of transfers were regarded as of the same type or class subject in all respects to the same interpretation, construction, and treatment, it is difficult to conceive what such language might be.

In the light of the obvious intent of Congress that transfers in contemplation of death and transfers intended to take effect in possession or enjoyment at or after death should be treated alike, it follows from the decisions in the five cases above cited that transfers in contemplation of death, as well as the transfers which were before the Courts in those cases, are taxable only where the interest involved passes from the possession, enjoyment, or control of the decedent at his death, so that the interest so passing constitutes a part of the "net estate" transferred at death within the meaning of Section 401.

In the case at bar, the transfer was outright and not conditional, and took place over three years prior to decedent's death. Not only did no interest pass from the decedent at the time of his death, but there was not even such a change of possession or enjoyment at the time of death as existed

in the cases above cited. No interest was obliterated by the decedent's death, and such death was in no sense a "generating source". The transfer, therefore, was not one involving a devolution of any description at the date of death and, in the light of the reasoning of the Reinecke and other cases above mentioned, was not a transfer coming within Section 402(c). It was not, therefore, subject to the tax imposed by Section 401.

This interpretation, limiting gifts made in contemplation of death to gifts which do not take full effect until death, was precisely the interpretation adopted by the Supreme Court of the State of Pennsylvania in a decision which is directly in point. *Spangler's Estate*, 281 Pa. St. 118. That case involved eighteen appeals raising the issue of the constitutionality of the Pennsylvania Act of 1919 purporting to tax gifts made in contemplation of death or intended to take effect in possession or enjoyment at or after death. The Pennsylvania Constitution provided that

> "No bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title."

The title to the Act in question provided for the

> "imposition and collection of certain taxes upon the transfer of property passing from a decedent * * * at the time of his death."

The body of the Act included a tax upon transfers made in contemplation of death or intended to take effect in possession or enjoyment at or after death. The question was thus squarely raised whether property so transferred constituted property "passing from a decedent at the time of his death". The Court, after holding that property which

had been so transferred as to vest in possession or enjoyment at or after the death of the transferor did pass from the decedent at the time of his death and was therefore within the expression of the title, continued:

> "The same conclusion must be reached as to the words 'made in contemplation of the death of the grantor, vendor or donor' in the Act of 1919, if they are limited to gifts which do not take full effect before that time. As this is a possible construction, we are bound to adopt it, and thus make the whole of the Act constitutional. If there are any provisions in the body of the statute, which go beyond the limitation stated, they must fall; * * *"

The appropriateness of this construction is particularly apparent in the case of a gift such as the one now under consideration, made several years prior to the enactment of the applicable Act. The tendency of the courts has ever been to avoid attributing to a statute retroactive import wherever such retroactive construction is avoidable. As stated by Mr. Justice McKenna, in *Shwab* v. *Doyle*, 258 U. S. 529, 534:

> "The comment of Story is, 'retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact'.
>
> "There is absolute prohibition against them when their purpose is punitive; they then being denominated *ex post facto* laws. It is the sense of the situation that that which impels prohibition in such case exacts clearness of declaration when burdens are imposed upon completed and remote transactions, or consequences given to them of which there could have

> been no foresight or contemplation when they were designed and consummated."

In *Blodgett v. Holden*, 275 U. S. 142, 148, Mr. Justice Holmes, speaking of the Gift Tax Act, said:

> "If when the statute was passed it had been well recognized that Congress had no power to tax past gifts I think that we should have no trouble in reading the Act as meant to operate only from its date and only to tax gifts thereafter made. If I am right, we should read it that way now."

By reading Section 402(c) as intended to tax transfers and trusts in contemplation of or intended to take effect in possession or enjoyment at or after death, only in those cases where the interest in question passes from the possession, enjoyment, or control of the transferor at his death, the parenthetical clause "whether such transfer or trust is made or created before or after the passage of this Act", inserted for the first time in the 1918 Act, has in fact no retroactive operation. Under that interpretation the tax would be imposed in respect of the devolution at death occurring after the passage of the Act. Under that interpretation, the tax becomes an excise upon the event of death and not a direct tax upon the property; the basis for determining the value of the property taxed becomes the value of the interest transferred at the time of the actual consummation of the transfer and not at some other and wholly unrelated time; the arbitrary character of the tax and the capricious results otherwise produced by its imposition, as hereinafter noted, are removed; and the statute is freed from the element of retroactivity and from any question as to its constitutionality. So construed, the Act imposes no tax upon the transfer here under consideration, since that

transfer was completely and irrevocably consummated more than three years prior to decedent's death and no interest in the property passed from his possession, enjoyment, or control at the time of his death.

POINT II.

Section 402(c) of the Act, if construed to tax a transfer made before the passage of the Act, is unconstitutional. The decision of this Court in *Nichols* v. *Coolidge* holding this section invalid as to such a transfer intended to take effect in possession or enjoyment at or after death applies *a fortiori* to a transfer made in contemplation of death.

Petitioners claim that Section 402(c) of the 1918 Act, if construed to apply to the facts here at issue, is invalid: first, in that it violates the due process clause of the Fifth Amendment to the Constitution of the United States in purporting to lay an excise in respect of a transfer of property which had been fully and irrevocably completed more than two years prior to the adoption of the Act; second, in that it similarly violates the due process clause of the Fifth Amendment in purporting to lay an excise upon the estate of decedent in respect of property belonging to third persons and not constituting any part of the estate of such decedent and upon the basis of a valuation of such property of third persons bearing no reasonable or necessary relation to the value of any property owned by the decedent either at the time of his death or at any other time.

These contentions are sustained by the determination of this Court in *Nichols* v. *Coolidge*, 274 U. S. 531. In that case decedent died January 6th, 1921. In July, 1907, she

and her husband had made a transfer of certain property to trustees to pay the income to the settlors, then to the survivor and, after the death of the survivor, to distribute the *corpus* among their five children, and, should any child predecease such survivor, the share of such child to be distributed to those entitled to his intestate property under the statute of distribution then in effect, with a limitation upon the share of a surviving widow. In April, 1917, the settlors assigned to the five children their entire interest in the property, especially their right to the income therefrom. The devolution of the corpus of the trust was, of course, determined solely by the 1907 transfer and was not in any manner affected by the assignment of income made in 1917. The Government claimed that the transfer was one intended to take effect in possession or enjoyment at or after death and that it was, therefore, taxable under Section 402(c) and at the value of the property at the time of decedent's death. This Court said (pp. 542-543):

> "we must conclude that §402(c) of the statute here under consideration, in so far as it requires that there shall be included in the gross estate the value of property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious and amounts to confiscation."

The principle there enunciated—that a statute purporting to impose a federal tax may be so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment—appears to have been first suggested by this Court in *Pollock* v. *Farmers Loan & Trust Co.*, 158 U. S. 601, 633, in which there was a suggestion that a tax might be

> "so wanting in uniformity and equality as in substance to amount to deprivation of property without due process of law".

In *Knowlton* v. *Moore*, 178 U. S. 41, 77, this Court suggested the question

> "whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems".

In *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1, 24-25, this Court again suggested that a seeming exercise of the taxing power might be

> "so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property, that is, a taking of the same in violation of the Fifth Amendment, or what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion".

In *Levy* v. *Wardell*, 258 U. S. 542, 544, Mr. Justice McKenna, delivering the opinion of the Court, said:

> "The Act of Congress, therefore, should not be construed to be retroactive, and, if so construed, was in violation of the Constitution of the United States in that it would take the property of plaintiffs without due process of law in violation of the Fifth Amendment."

The same principle was recognized in *National Paper & Type Co.* v. *Bowers*, 266 U. S. 373, and *Barclay Co. Inc.* v. *Edwards*, 267 U. S. 442. It had already been repeatedly recognized in connection with the due process clause of the Fourteenth Amendment as applied to similar state statutes (*Hartman* v. *Greenhow*, 102 U. S. 672; *Gulf, etc., Railway* v. *Ellis*, 165 U. S. 150; *Campbell* v. *California*, 200 U. S. 87; *Maxwell* v. *Bugbee*, 250 U. S. 525; *Dane* v. *Jackson*, 256 U. S. 589) and as stated by Mr. Justice Holmes in *Carroll* v. *Greenwich Insurance Co.*, 199 U. S. 401, 410:

> "If an act of Congress is valid under the Fifth Amendment it would be hard to say that a state law in like terms was void under the Fourteenth."

In the same manner various state courts in passing upon the issue of retroactive succession and estate taxes have with practical unanimity refused to sustain the tax, either because of the limitation imposed by the due process clause of the Fourteenth Amendment or because of provisions of the State Constitution similar to the limitations of the Fifth and Fourteenth Amendments. *Matter of Pell*, 171 N. Y. 48; *Matter of Lansing*, 182 N. Y. 238; *Matter of Langdon*, 153 N. Y. 6; *Commonwealth* v. *Wellford*, 114 Va. 372; *Hunt* v. *Wicht*, 174 Cal. 205; *Lacy* v. *Treasurer*, 152 Iowa 477; *Eury's Executors* v. *State*, 72 Ohio State 448; *Tozer* v. *Probate Court*, 102 Minn. 268; *Arenac County* v. *Iosco County*, 158 Mich. 344; *Commonwealth* v. *McCauley's Executors*, 166 Ky. 450; *State* v. *Safe Deposit & Trust Co.*, 132 Md. 251; *Succession of Stauffer*, 119 La. 66; *In re Collateral Inheritance Tax*, 88 Me. 587; *Carter* v. *Whitcomb*, 74 N. H. 482; *Re Spangler's Estate*, 281 Pa. 118.

The same principle was subsequently applied by this Court to the various gift tax cases in which the Treasury

Department had sought to impose the tax retroactively. (*McNeir* v. *Anderson*, 275 U. S. 577; *Blodgett* v. *Holden*, *supra*; *Untermyer* v. *Anderson*, 276 U. S. 440.)

Accordingly, the principle enunciated in *Nichols* v. *Coolidge* and in the gift tax cases is not unique and should not "be held applicable only to the particular facts in the cases as to which those opinions were rendered". (See Opinion of the Court of Claims herein, R. 22.) On the contrary, it is a principle which has been uniformly applied by this Court for at least the half-century last past wherever, under the label of an exercise of the taxing power, either Congress or the Legislature of a State has provided a rule so arbitrary and capricious, so wanting in a just and reasonable basis for classification, as to be in effect confiscatory or, as suggested in *Henderson Bridge Co.* v. *Henderson City*, 173 U. S. 592, 615, to amount to "spoliation under the guise of exerting the power to tax". It is, moreover, a principle which has been similarly enunciated in practically all cases in which the same question has been raised before State courts.

The Court of Claims in its opinion herein seeks to distinguish the present case from the Coolidge case on the ground that the transfer in the present case was made in contemplation of death. It said (R. 18, 19):

> "In the Coolidge case, *supra*, the transactions are said to be 'not testamentary in character', by which we understand the Court to mean that they were not made in contemplation of death as a part of a plan of distributing the estate of the grantor by conveyance instead of by will. * * *.
>
> "In the instant case, the maker of the transfer, as in practically all cases where a conveyance is made in contemplation of death, was using the conveyance to dispose of or distribute his property instead of

> a will. * * * In its effect it differed but little from disposition by will. * * * What reason can be given why the estate of the man who transfers a part of his property in contemplation of death should not pay the same tax as the one who transfers it by will?"

It is difficult to understand what the Court of Claims meant by saying that the transfer was used in the place of a will. The donor did have a will disposing of his property upon his death and the appellants herein are the duly qualified executors under that will. The effect of the transfer made in December, 1916, was to remove the 2,713 shares of stock from the property and estate of the donor subject to disposition upon death under the terms of his will, to divest the donor immediately of the possession, use, control, and power of disposition of the property, and to vest the same immediately in the transferees. It is, perhaps, unfortunate that the Court of Claims saw fit to omit from their findings of fact the special circumstances surrounding the gift which clearly showed the reasons other than the anticipation of the possibility of death that prompted the transfer. Whatever these reasons may have been, however, it is clear from the facts that the transfer was not made because of the lack of a will or for the purpose of vesting title to the property at death as a substitute means in lieu of a will but was to bring about an immediate and irrevocable transfer of the property without awaiting death, whenever that might occur.

Contrary to the assertion of the Court of Claims, the transfer did differ materially in its effect from a disposition by will. The donees from the instant of the transfer had the full and unrestricted use and enjoyment of the property. The income arising therefrom, which, but for the

gift, would have accrued to the donor, was received and used by the donees for upwards of three years prior to the donor's death. Whatever enhancement in value accrued to the stock during this period increased the wealth of the donees, not of the donor. In effect, it differed from a disposition by will in every way in which any gift *inter vivos* differs from a distribution by will.

Another striking difference between the effect of a gift in contemplation of death and a disposition by will occurs upon the subsequent sale of the property by the donee. For example, under Section 113 of the 1928 Act, 45 Stat. 818 (and substantially like provisions of prior Acts) the basis for determining gain or loss on the sale of property acquired by will or intestacy is the value at the time of decedent's death (or in some cases at the time of later distribution to the taxpayer). The basis in respect of property acquired by gift, however, is either its value at the time of the gift or cost to the donor according to whether or not the gift was made prior to January 1st, 1921. The validity of the tax based on cost to the donor has been sustained by this Court (*Taft* v. *Bowers*, 278 U. S. 470; *Cooper* v. *United States*, 280 U. S. 409). The statute makes no distinction between gifts in contemplation of death and other gifts *inter vivos* and the Departmental Regulations (Reg. 74, Arts. 593, 595) provide that this basis applies to gifts and transfers in trust "whether or not made in contemplation of death or intended to take effect in possession or enjoyment at or after death".

Accordingly, if a gift in contemplation of death is made of property which cost the donor $25,000 and which is worth $25,000 at the time of the gift and the property has a value of $100,000 at the time of the donor's death, under the Government's contention herein the property would be in-

cluded as a part of the donor's estate and would be taxed at the $100,000 value. If the donee then sells the property at $100,000 he becomes subject to an income tax on a profit of $75,000. Had he received the same property by will and made a similar sale, the estate tax would then have been properly based on the $100,000 value but the donee would have been liable to no income tax on the subsequent sale.

The reason why the estate of a man who disposes of a part of his property by outright gift *inter vivos*, whether or not in contemplation of death, should not pay the same tax as the one who transfers his entire property by will is that the gift is not a transfer of property at death and therefore cannot properly be subjected to death duties, and the results and effect of the two methods of disposition are dissimilar in every material respect, including the income tax liability upon a subsequent sale of the property transferred.

The transfer here under consideration was not in any way testamentary in character. The outstanding characteristics of a testamentary disposition of property are that the donor not only retains until death the full title, use, possession, and enjoyment of the interest involved, but also retains until death the full and unrestricted right to modify, alter, or completely revoke the disposition provided for. None of these attributes of a testamentary disposition of property existed in connection with the transfer here involved. At least some of them, and in many instances all of them, do exist in the case of a transfer intended to take effect at or after death. Accordingly, if a gift made prior to the enactment of the applicable taxing act and intended to take effect in possession or enjoyment at or after death

cannot be validly taxed thereunder, it follows, *a fortiori*, that an outright gift fully and irrevocably consummated prior to such enactment cannot be so taxed whether or not such gift was made in contemplation of death.

In the gift intended to take effect at or after death, possession or enjoyment or the right to modify or revoke or the right otherwise to control the property is retained by the donor and does not vest in the ultimate transferee until the donor's death. The complete fruition and accomplishment of the donor's ultimate purpose is postponed until his death. Death is, in respect of some one or more elements of the interest transferred, the "generating source" of the transfer. Even in *Nichols* v. *Coolidge*, the transferees did not receive the property in fee until the death of the survivor of the grantors nor could the ultimate recipients be determined until such death. (See *Coolidge* v. *Loring*, 235 Mass. 220; *Coolidge* v. *Nichols*, 4 Fed. (2nd) 112, 115.)

Such is not the case in respect of a gift, whether or not made in contemplation of death, which, as in the present case, has been irrevocably consummated prior to the adoption of the taxing statute and years prior to the death of the donor. In the present case, the donor did not retain even any of the rights or interests the retention of which this and other courts have held not to result in taxability, such as the reservation of life income (*May* v. *Heiner, Commissioner* v. *Northern Trust Co., McCaughn* v. *Carnill* and *Hodgkins* v. *Commissioner, supra*), or the right to alter or revoke with the consent of the trustee (*Farmers Loan and Trust Company* v. *Bowers*, 29 Fed. (2nd) 14; *Erskine* v. *White*, D. C. Mass. Dist. No. 4272, decided Oct. 1, 1930, not yet reported), or the right to revoke with the consent of the beneficiary (*Reinecke* v. *Northern Trust Co., supra*).

There was, in the present case, no tying up of property in trust nor postponement of the full and unrestricted use of the donee for the donor's life or for the life of others or by way of accumulation for any period whatsoever (See *Shukert* v. *Allen*, 273 U. S. 545). The transfer was an immediate transfer of the entire property complete, unqualified, unlimited, indefeasible, and irrevocable, made over two years prior to the adoption of the Act under which the tax is sought to be imposed and over three years prior to the date of the donor's death. The death of the donor, when it did occur, effected no change whatsoever in the right, title, and interest in and to the shares of stock involved or the possession, use, control, and enjoyment thereof. Death was in no sense a "generating source" of the transmission of the property or of the succession thereto or to any interest therein or attribute thereof.

The implication of the remarks of the Court of Claims above quoted is that a transfer in contemplation of death has a testamentary nature and bears a resemblance to a disposition by will lacking in the transfer intended to take effect in possession or enjoyment at or after death. As has been shown, however, the contrary is true. The transfer intended to take effect at or after death has many of the attributes of a testamentary disposition, all of which are wholly absent in the case of a transfer in contemplation of death. This court held in the *Coolidge* case that a transfer intended to take effect in possession or enjoyment at or after death, made prior to the enactment of the 1918 Act, cannot be validly taxed under Section 402(c) of that Act. It follows that no more, in fact, much less, can a transfer in contemplation of death similarly made be so taxed.

POINT III.

The retroactive application of Section 402(c) of the 1918 Act to transfers in contemplation of death made prior to the effective date of that Act cannot be supported as a necessary adjunct to the enforcement of the general provisions of the statute taxing the net estates of decedents.

Ever since *Knowlton* v. *Moore*, 178 U. S. 41, at least, if not prior thereto, it has been recognized that

> "the public contribution which death duties exact is predicated on the passing of property as the result of death".

As pointed out by this Court in *Reinecke* v. *Northern Trust Co., supra:*

> "One may freely give his property to another by absolute gift without subjecting himself or his estate to a tax."

A tax on transfers in contemplation of death cannot be supported as a gift tax because of its want of a proper basis for classification and of a reasonable relation to the subject. (See *Schlesinger* v. *Wisconsin*, 270 U. S. 230.) As a gift tax it is as discriminatory as would be a tax on gifts made by red-headed men or on gifts made on Wednesday. (See quotation from *Frew* v. *Bowers, infra*, p. 32.) It is also obvious that, in an outright gift of this nature, the property does not in fact pass as the result of death but as the result of a gift made *inter vivos*, frequently, as here, several years prior to death. Accordingly, it cannot be supported as a death duty. If the tax can be supported at all, therefore, it must be upon the theory that it is

"valid as a necessary adjunct to a matter that lies within legislative power, even though, standing alone, its constitutionality might have been subject to doubt." (See dissenting opinion of Mr. Justice Brandeis in *Untermyer* v. *Anderson, supra,* p. 451.)

In *Nichols* v. *Coolidge, supra,* this Court said (p. 542):

> "Undoubtedly, Congress may require that property *subsequently* transferred in contemplation of death be treated as part of the estate for purposes of taxation. This is necessary to prevent evasion and give practical effect to the exercise of admitted power, *but the right is limited by the necessity.*"

The Court of Claims said (R. 20):

> "It is perfectly evident that if the owner of an estate, after he had reason to believe that death was nigh, could in contemplation thereof distribute his property by gift instead of by will, the means of avoiding the estate tax would be so apparent and easy, avoidance would become the rule and the payment of the tax the exception * * *. It ought also to be said in this connection that the provision in the statute which made it apply to prior transactions was undoubtedly intended to prevent evasion by making conveyances before the act could go into force. Such provisions have been held valid in tariff acts."

Are these suggestions of the lower court borne out by the facts? Are transfers in contemplation of death so prevalent as to constitute the rule rather than the exception? Is the menace of tax evasion so great as to require the retroactive taxation of gifts in contemplation of death, even at the expense of straining constitutional principles and requirements?

Eliminating gifts *causa mortis*, with which we are not here concerned, it would seem obvious that the very nature of a gift in contemplation of death would effectually prevent its adoption as a means of tax avoidance. In the Court below, the defendant quoted from *Mahan* v. *Plank*, 289 Fed. 722:

> "To hold and enjoy one's property, and yet to provide for its passage to children, unburdened by inheritance tax or administration expense, has been the task and worry of many an accumulator during the later years of his life."

This undoubtedly is true, but the defendant and the Court of Claims overlooked the compelling force of the first clause quoted: *"To hold and enjoy one's property"*. The gift which takes effect at or after death enables the donor to hold and enjoy his property. The outright gift in contemplation of death prevents it. However strong the desire to minimize taxes may be, the desire to retain the full use and enjoyment of one's property during life is a much stronger force. Even apart from retroactive application, therefore, it does not appear reasonable to assume that gifts in contemplation of death, if wholly tax-free, would produce any substantial loss of revenue to the Government. That this is true is shown by the relatively few cases involving contemplation of death which have been before the courts, notwithstanding the astuteness of the Tax Department in alleging contemplation under any and all possible circumstances. It is further shown by the still smaller number of cases in which the courts have found that the transfers involved actually were made in contemplation of death. An example of the comparative extent of the use of gifts in contemplation of death and gifts intended to take effect at

or after death may be found in the further fact that, while numerous cases involving the latter class of gifts have been decided by this Court, this is the first case directly involving the issue of contemplation of death, not only since the passage of the 1916 Act but, so far as counsel for petitioners can find, under any of the various federal succession and transfer tax statutes, which appears to have reached this Court.

But the proposition goes much further than this. It is unnecessary for petitioners to claim that transfers in contemplation of death made subsequent to the passage of the Act under which the tax is sought to be imposed may not validly be subjected to the excise. What the Government here claims and what petitioners deny is that the necessity exists for a retroactive application of the tax. Gifts in contemplation of death are made in the anticipation that death is nigh. Accordingly, each property owner who desires to make a transfer in contemplation of death in order to avoid the tax must first wait until he has reasonable ground for believing that he is about to die. Otherwise, the transfer would not be in contemplation of death within the legal significance of those words and would not be taxable in any event. But if he makes the transfer and dies while the Act in force at the time the gift was made is still in effect, the transfer will be taxable. Accordingly, in order to accomplish his purpose of tax evasion, he must find a means, after effecting the transfer, to postpone the date of his death for several years and until such time as Congress in its discretion may see fit to repeal the existing law and to enact a new statute imposing additional and more burdensome tax rates. Obviously, no such power exists. It is apparent that the tax cannot be thus avoided and, since "the right is limited by the necessity", no basis exists for upholding

the retroactive application of the tax to transfers made in contemplation of death as a necessary adjunct to the enforcement of the general excise on property passing as the result of death.

As Mr. Justice McReynolds said in *Schlesinger* v. *Wisconsin, supra,* p. 240:

> "The presumption and consequent taxation are defended upon the theory that, exercising judgment and discretion, the legislature found them necessary in order to prevent evasion of inheritance taxes. That is to say, 'A' may be required to submit to an exactment forbidden by the Constitution if this seems necessary in order to enable the State readily to collect lawful charges against 'B'. Rights guaranteed by the federal Constitution are not to be so lightly treated; they are superior to this supposed necessity."

The Court of Claims, as above indicated, stated that "Such provisions have been held valid in tariff acts". No cases were cited in support of this proposition and a careful examination of the various tariff acts and cases arising thereunder has failed to reveal any cases of this nature. On the contrary, in at least two cases in which this question has arisen (*United States* v. *Burr,* 159 U. S. 78; *United States* v. *American Sugar Refining Co.,* 202 U. S. 563) this Court has refused to construe tariff laws as having been intended to be given retrospective application. It is possible that the Court may have had in mind such cases as *United States* v. *Heinszen,* 206 U. S. 370, and *Rafferty* v. *Smith Bell & Co.,* 257 U. S. 226, involving Philippine tariffs, but in those cases a tariff was in existence at the time the duties were collected and the decisions were rested on the principle of ratification of the acts of an agent. In the Heinszen case the Court specifically pointed out that to

treat the act of Congress ratifying the collection of the tariff as "retrospective legislation enacting a tariff." was misstating the very nature of the act and proved the fallacy of the taxpayer's contention.

POINT IV.

In any event, the provisions of the Act fixing the measure of the tax on transfers under Section 402(c) are so arbitrary and capricious as to violate the Fifth Amendment.

The tax imposed upon the transfer here in question is complained of not merely because of the retroactive application of the 1918 Act, but because the tax thus retroactively applied was imposed at a rate approximately two and one-half times as great as that provided by the 1916 Act in effect at the time the gift was made, and, moreover, was imposed upon the property not at its value at the time of the gift nor at any time when it was in the possession of the decedent, but at its value at the time of his death, over three years after he had parted with all interest therein. The tax is thus imposed upon one entity, the estate of the decedent, in respect of property belonging to an entirely different entity, the donee of the antecedent gift, and on the basis of a value bearing no relation to any value of the property at any time while owned by the decedent. As far back as *Knowlton* v. *Moore, supra,* this Court intimated (p. 77) that there might be a doubt as to the validity of taxation

> "by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the

property of another, thus bringing about the profound inequality which we have noticed."

In fact, a half a century ago, and prior to *Knowlton* v. *Moore*, this Court said, in *Hartman* v. *Greenhow*, 102 U. S. 672, 684:

> "Surely it is not necessary to argue that an act which requires the holder of one contract to pay the taxes levied upon another contract held by a stranger cannot be sustained. Such an act is not a legitimate exercise of the taxing power; it undertakes to impose upon one the burden which should fall, if at all, upon another."

This phase of the case was considered by the Circuit Court of Appeals in *Frew* v. *Bowers*, 12 Fed. (2nd) 625; certiorari dismissed 275 U. S. 578. In that case, Circuit Judge Hough said (p. 628):

> "How, in any reasonable usage of the word, Mr. Nash can be said to have an 'interest' in 1922 in what he never owned, because he 'transferred' in 1910 the capital so skillfully increased by others, we are quite unable to perceive.
>
> • • • • • •
>
> "An excise tax on the transfer of property occurring by reason of the death of A, payable only out of A's estate, and graduated by the size of that estate, is augmented by treating as part of A's property the property of another, three-fifths of which Mr. Nash never owned, and two-fifths of which he gave to that other 12 years before his death.
>
> • • • • • •
>
> "But if the technical construction is wrong, then we must face the question whether it is within the power of Congress to do what has been done; *i. e.*, use the property of A as a measure for the tax to be laid upon B. Thus stated, it would seem impossible

to support the tax; attack must be on the form of statement. We have at great length examined the assemblage of phenomena that make up this case, in order to ascertain what they amount to; and we think the foregoing an accurate statement of what the tax at bar really is.

"If that description be accepted, while there is no classification of taxpayers, the tax itself is 'arbitrary and capricious'. *Barclay* v. *Edwards*, 267 U. S. 442, 450, 45 Sup. Ct. 135, 348 (69 L. Ed. 703). Further, a tax on a transfer by A, but measured by anything other than the estate of A, may be a duty or excise in form, but *it is a palpable effort to tax something other than the transfer*. In this case the effort is to tax in 1922 in respect of something untaxable in 1910."

In the same decision, Circuit Judge Hand, concurring, said (p. 630):

"In substance it imposes a tax upon the settlor, measured by the value of property at his death, over which he has parted with all control, perhaps, as here, long since. As to transfers made after the law went into effect I have nothing to say; one may insist that settlors take their chances. But as to those made before the law was passed it appears to me that the result is too whimsical to stand. There are settlements which the settlor outlives for 30 or 40 years. There is no limit to the increase in the value of land, for example, in such a period; it may easily be fifty-fold and the tax leave the settlor destitute when he dies. Conversely, another settlor may escape altogether. Such a tax is fixed by the mere sport of fortune. It has no more relation to the possessions or conduct of the taxpayer than if he were taxed upon the subsequent value of property he had sold outright, or his estate was doubled because he died on Wednesday. *Such a law is far more ca-*

pricious than merely retroactive taxes. Those do indeed impose unexpected burdens, but at least they distribute them in accordance with the taxpayer's wealth. But this section distributes them in accordance with another's wealth; that is a far more grievous injustice."

This decision was cited with approval in *Nichols* v. *Coolidge, supra* (p. 542), and certiorari was dismissed by stipulation after the Supreme Court had decided the Coolidge case.

In *Bradley* v. *Nichols,* 13 Fed. (2nd) 857, 859, affirmed 27 Fed. (2nd) 47, District Judge Morton said:

> "To say that property which has been completely given away, and upon the disposition of which the donor's death has no effect, is still part of the donor's estate, is to say something which is simply not true."

In *Hill* v. *Nichols,* 18 Fed. (2nd) 139, 140, District Judge Brewster said:

> "I am willing to accept the argument of the Government that Congress, having the power to tax an estate of a deceased person, may measure the tax by any standard which bears a reasonable relation to the subject and is not arbitrary. * * * But I cannot go with it to the extent of regarding as reasonable a measure which includes the value at time of his death of property of which the decedent has completely divested himself years before the Act imposing the tax was enacted."

The same point was commented upon by this Court in *Nichols* v. *Coolidge* (p. 542) as follows:

> "Property of small value transferred before death may have become immensely valuable, and the

> estate tax, swollen by this, may leave nothing for distribution. Real estate transferred years ago, when of small value, may be worth an enormous sum at the death. If the deceased leaves no estate there can be no tax; if, on the other hand, he leaves Ten dollars, both that and the real estate become liable. Different estates must bear disproportionate burdens determined by what the deceased did one or twenty years before he died."

That this feature was an important factor in the determination of the Coolidge case is indicated in the remarks of this Court distinguishing that case in *Saltonstall* v. *Saltonstall*, 276 U. S. 260, 270:

> "But we are here concerned * * *, not with an attempt to tax a donor's estate for an absolute gift made when no tax was thought of, *and to do so at the probably appreciated value which the gift now bears* * * *. The present tax is not laid on the donor, but on the beneficiary; the gift taxed is not one long since completed, but one which never passed to the beneficiaries beyond recall until the death of the donor; *and the value of the gift at that operative moment, rather than at some later date, is the basis of the tax.*"

As indicated in the above quotation from the Coolidge case, the estate pays or does not pay a tax on the transfer, depending on whether the transfer is of a part only or of all the assets. In *Levy* v. *Wardell, supra*, p. 544, this Court said:

> "She left no property or estate or assets whatever, and consequently, there was no estate to administer, nor any estate upon which any tax could be levied."

It is obvious that this basis of valuation must frequently produce results so unusual as to border on the grotesque. The same person may receive identical gifts at the same time from two different donors, both of whom die at the same time, one penniless, the other leaving a substantial estate. The latter estate is taxed at the full value of the gift at the time of death; the former escapes the tax because there are no funds in the estate out of which to collect. In both cases the donors parted with identical interests and in both the donees received identical benefits; yet one gift is taxed, the other not.

Again, a donor makes gifts at the same time of similar nature and identical value to two donees. The one donee, by his diligence and industry in developing the property, succeeds in increasing its value many fold. The other allows his gift to waste until it becomes worthless. The donor's estate at the time of his death is taxed in respect of the one property at a value several times that attributable to it at the time of the gift, but is not taxed at all in respect of the other. The tax thus depends, not upon the value of the property transferred, but upon the wholly adventitious and unrelated circumstance of the care given the property by the donee, a matter over which the donor has no control.

Again, a donor transfers securities worth $1,000,000, which the donee immediately sells for $1,000,000, but at the time of the donor's subsequent death the particular securities have a value of five or ten million dollars. Since the tax is upon the value at the time of death of the particular property which was transferred, the donor's estate will be taxed on the basis of the five or ten million dollar value, notwithstanding the fact that the donor did not transfer nor the donee receive or enjoy such value. The arbitrary and capricious nature of the statute would be equally mani-

fest if the value of the securities transferred, instead of increasing five or tenfold, were to diminish to the point of worthlessness. The tax borne by the estate depends not upon the value of the property transferred nor upon the quantum of benefit received by the transferee, but upon extraneous circumstances bearing no reasonable relation to the transfer and over which neither donor nor donee have any control whatsoever.

The Act does not operate in such manner as to tax a transfer in contemplation of death, made in lieu of a will, in the same manner as the property transferred would have been taxed had the same disposition been made by will. It operates in such manner as to prevent the transferor from making the testamentary disposition that he desires of his remaining property. In fact, it may easily so operate as to make it wholly impossible for him to provide for his family after his death. The gift in contemplation of death may be of property then regarded as of comparatively slight value but which by reason of some unexpected development, such as the discovery of oil or mineral ore, attains such value that the tax more than consumes the remaining estate, thereby rendering it wholly impossible for the donor to provide for his widow and children.

Similarly, a father, anticipating death in the near future, desires to divide his estate equally between his son, who is about to start in business for himself, and a daughter, who is wholly dependent on the father for support. He makes an immediate transfer of a half interest in the property to his son to enable him to go into business; the other half he wills to his daughter. At the time of the father's death, the son's business has so prospered that the tax based on its then value consumes the greater part or all of the estate which was willed to the dependent daughter.

The father's purpose is thus wholly defeated. His entire estate at the time of the gift may have been less than the statutory exemption, yet the daughter's half is consumed in paying a tax to the Government not on property transferred by the father at death or at any other time but on accretions to value developed by the transferee, who escapes the tax entirely.

It might, perhaps, be argued that this Court erred in the statements made by it in *Levy* v. *Wardell* and *Nichols* v. *Coolidge,* above referred to, to the effect that there is no tax if there is no estate out of which it may be collected, since Section 409 of the statute imposes a contingent liability upon the donee in case the tax is not paid by the executor. The validity of this provision is open to serious doubt (see *Lewellyn* v. *Frick,* 268 U. S. 238), but, if it be upheld, the Act represents a still further paradox. In the supposititious case above suggested, where the transferee immediately sells the property and it subsequently increases materially in value, assume that the transferor dies bankrupt. The transferee then becomes liable for the tax on the property at a value greatly in excess of that which he received and wholly as the result of the bankruptcy of the transferor, that is to say, "A" is taxed on the value of property owned by "B" because of the bankruptcy of "C". It would be difficult to conjure out of one's imagination a tax more arbitrary and capricious, a tax producing more gross and patent inequality, a tax depending more upon the whim and sport of fortune and less upon the nature of the thing taxed than this.

The Court of Claims (R. 21) brushed aside this feature of the Act with the comment that it applied equally to transfers made after the passage of the applicable Act. It would appear more accurate to say that the same objection

applies, although in lesser degree, to a transfer made subsequent to the passage of the Act. It may well be that the basis prescribed is so arbitrary and so wanting in due relation between the measure of the tax and the thing taxed as to be invalid in any case. That, however, is a question which it is not necessary here to decide. In this same connection, Circuit Judge Hand, in *Frew* v. *Bowers, supra* (p. 630), said:

> "As to transfers made after the law went into effect I have nothing to say; one may insist that settlors take their chances. But as to those made before the law was passed it appears to me that the result is too whimsical to stand."

POINT V.

The retroactive application of Section 402(c) amounts to an unapportioned direct tax forbidden by Sections 2 and 9 of Article I of the Constitution.

A tax imposed upon the estate of a decedent, measured by the value of property which he has long since disposed of, is a direct tax and cannot properly be considered an excise upon the transfer of property by death, where the transfer, as in the case at bar, was made prior to the passage of the act purporting to impose the tax.

This point is well brought out in an article on "Retroactive Excise Taxation" in Volume 37 of the Harvard Law Review from which we quote the following:

> "The very nature of an excise, however,—a tax upon the privilege of doing a certain act or receiving a certain transfer, makes it necessary that such a tax be confined to prospective operation. If the taxpayer has already completed the transaction, a tax upon the privilege of consummating it is a con-

> tradiction in terms. The taxpayer has no choice in the matter. He has made an executed sale or received a vested conveyance upon which there was no restraint for the purposes of revenue. If he is later taxed on this account, it is an unavoidable and absolute demand. He has not the opportunity of exercising the privilege and thereby incurring the tax or refusing to exercise the privilege and thereby avoiding the tax. It becomes in effect a direct assessment upon the property itself 'simply because of its ownership', and as such is unconstitutional if unapportioned among the states" * * * 37 *Harvard Law Review,* 694, 695.

To the same effect, see 26 *Columbia Law Review* 852, 858. The writer there states:

> "Since the transfer of the *res* has been completed before the passage of the tax statute no privilege must be exercised as a condition to the imposition of the tax. The tax is upon a particular class of *res,* defined by its connection with some past event. Hence the tax should be invalidated on the ground that it is direct."

The outstanding feature of a direct tax as distinguished from duties, imposts, and excises is that of an "absolute and unavoidable demand". See *Thomas* v. *United States,* 192 U. S. 363, 371; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 151-152; *South Carolina* v. *United States,* 39 Ct. Cls. 257; affd. 199 U. S. 437. The direct tax is obligatory. The demand is absolute and unavoidable and there is no means of escaping its incidence. An excise, on the other hand, is voluntary. The person who would otherwise be subject to the tax may escape it by not doing the thing subject to the excise. This absolute and unavoidable demand clearly exists when an attempt is made to tax a transfer effected

prior to the adoption of the taxing statute. The transfer has been accomplished beyond recall. The donor is powerless to avoid the tax. The tax is therefore direct. At the time of the enactment of the statute, the property has passed beyond the control of the donor; there is no event or transaction occurring, no right or privilege exercised by the donor after the passage of the Act in any manner connected with the property upon which an excise can be predicated; since there is no event or privilege to be taxed, the only tax that can be laid is a direct tax upon the property or the person. This was clearly expressed by Mr. Justice McKenna in *Levy* v. *Wardell, supra* (pp. 544-545):

> "The Act of Congress, therefore, should not be construed to be retroactive, and, if so construed * * * would not be, besides, a transfer tax or an indirect tax but would be a direct tax thereon in violation of Article I, Section 9, subdivision 4 of the Constitution of the United States, because not laid in proper relation to census or enumeration as therein provided."

When, as is clear, the tax in respect of property transferred by the decedent prior to the passage of the taxing act would constitute a direct tax, the attempt to sustain its legality by calling it an excise tax upon the transmission of the decedent's estate upon his later death must fail. The determination of the nature of the tax "must regard the substance of the exaction—its operation and effect as enforced—and cannot depend upon the manner in which the taxing scheme has been characterized". *Kansas City Railway* v. *Kansas,* 240 U. S. 227, 231.

Thus, in *Dawson* v. *Kentucky Distilleries Co.,* 255 U. S. 288, the Kentucky statute imposed an "annual license tax" on persons engaged "in the business of owning and stor-

ing whisky", the tax being fifty cents a gallon on whisky withdrawn from bond or transferred in bond to another state. This Court held that, notwithstanding the language of the Act, this was not an excise but was a direct tax on the property itself. Mr. Justice Brandeis, speaking for the Court, said (pp. 292, 294):

> "The name by which the tax is described is, of course, immaterial. Its character must be determined by its incidents, and obviously it has none of the ordinary incidents of an occupation tax * * *. The whole value of the whisky depends upon the owner's right to get it from the place where the law has compelled him to put it, and to tax the right is to tax the value. To levy a tax by reason of ownership of property is to tax the property. It cannot be made an occupation or license tax by calling it so."

For the same reasons it has been held that "a tax on the sale of an article, imported only for sale, is a tax on the article itself" and "a tax on the occupation of an importer is, in like manner, a tax on importation" (*Brown* v. *Maryland*, 12 Wheat. 419, 25 U. S. 554, 562); that "a tax or duty on a bill of lading, although differing in form from a duty on the article shipped, is in substance the same thing" (*Almy* v. *California*, 24 How. 169, 174); that a "license tax exacted * * * from dealers in goods * * * must be regarded as a tax upon such goods themselves" (*Welton* v. *Missouri*, 91 U. S. 275, 279); that "a tax on sales made by an auctioneer is a tax on the goods sold" (*Cook* v. *Pennsylvania*, 97 U. S. 566, 573); that "a tax on * * * charter parties was in substance a tax on the exportation; and a tax on the exportation is a tax on the exports" (*U. S.* v. *Hvosléf*, 237 U. S. 1, 17); and that a stamp tax on policies of marine insurance on exports is a tax on the exports

themselves (*Thames & Mersey Ins. Co.* v. *U. S.*, 237 U. S. 19). In all these and other similar cases the Supreme Court has looked through the form of the tax, purporting to be an indirect tax, and has regarded the actual substance and accordingly has held the taxes to be direct. In answer to the argument advanced in *Brown* v. *Maryland, supra,* that the tax was not on the article sold but was an occupation tax on the seller, the Court said: "It is impossible to conceal from ourselves, that this is varying the form, without varying the substance."

POINT VI.

The applicability of the principles enunciated by this Court in *Nichols* v. *Coolidge* is not affected by the fact that the transfer in the present case was made subsequent to the passage of the 1916 Act.

Although this Court has repeatedly sustained the retroactive application of direct taxes within reasonable limits, it has in every instance in which the issue has been squarely raised uniformly refused to uphold the application of an excise to an event or transaction fully consummated prior to the adoption of the taxing Act. (*Nichols* v. *Coolidge, supra; Frew* v. *Bowers, supra; Levy* v. *Wardell, supra;* and the several Gift Tax cases above cited. See also *Forbes Boat Line* v. *Board of Commissioners,* 258 U. S. 338, and the several Estate Tax cases above cited in which the Act was so construed as to avoid the stigma of retroactivity.) The argument of the Government that these cases should be distinguished on the ground that there the transfers in question were not made in contemplation of death has already been commented upon. The Government seeks to distinguish *Nichols* v. *Coolidge* on the further ground that

the transfer there sought to be taxed was made in 1907, at a time when there was no federal statute taxing transfers of this nature, whereas the transfer in the instant case; although made prior to the adoption of the 1918 Act under which the tax was assessed, was, nevertheless, made in 1916 at a time when there was in effect a somewhat similar statute subjecting transfers in contemplation of death to tax but at a much lower rate. It is submitted that this does not constitute a valid basis for distinguishing the cases and refusing to apply the rule laid down in *Nichols* v. *Coolidge* to the facts here presented. This Court, in the Coolidge case, as has above been stated, suggested that property *subsequently* transferred in contemplation of death might be treated as constituting a part of the taxable estate. Again (p. 543) the Court stated that in so far as Section 402(c) of the statute (viz., the 1918 Act) required that property transferred prior to *its* passage be included in the taxable estate merely because the conveyance was intended to take effect in possession or enjoyment at or after death, it was in violation of the due process clause of the Constitution. "Its" obviously refers to the 1918 Act and not to the prior 1916 Act.

In the present case, the Act of September 8th, 1916, in effect at the time of the gift, imposed a tax at rates beginning at 1% on the amount of the net estate in excess of $50,000 and running up to 10% on the amount in excess of $5,000,000. This was amended by the Act of March 3rd, 1917, which increased the rates to amounts from 1½% on the lowest bracket up to 15% on the highest. It was further supplemented by the Act of October 3rd, 1917, which left the 1916 Act as amended unimpaired but provided for additional taxes at rates of from 1% on the amount of the net estate not in excess of $50,000 up to 10% on the amount

in excess of $10,000,000. All three of these Acts were repealed by Section 1400 of the 1918 Act, adopted February 24th, 1919, and in lieu thereof a new tax was imposed at rates beginning at 1% on the amount of the net estate not in excess of $50,000 and running up to 25% on the amount in excess of $10,000,000.

At the time of the gift, this nation was at peace with the world. Between that time and the time of the adoption of the Act under which the tax is here sought to be imposed, the United States had entered the World War, that war had been fought to a conclusion, and successive tax laws had been adopted for the purpose of enabling the Government to meet the tremendous war costs which not only had not been incurred, but, if anticipated at all, were considered only as remote possibilities at the time the transfer was made. Substantially all of the tax here at issue was assessed at the maximum 25% rate, a rate two and one-half times as great as that in effect at the time of the transfer. The earlier Act was a more or less normal peace-time measure. The later Acts, including the one under which the tax was assessed, were emergency war revenue measures.

In *Untermyer* v. *Anderson, supra,* the Court said (p. 445):

> "The taxpayer may justly demand to know when and how he becomes liable for taxes—he cannot foresee and ought not to be required to guess the outcome of pending measures. The future of every bill while before Congress is necessarily uncertain. The will of the lawmakers is not definitely expressed until final action thereon has been taken."

If a taxpayer cannot be expected to foresee the adoption of a bill actually pending in Congress, the terms of which are definitely known to him, how can he be expected to fore-

see the adoption of another and different bill to be submitted to Congress years later to meet an extraordinary and almost cataclysmic emergency which has arisen in the interim? How can it be said that the 10% tax in effect in 1916 furnished an "adequate warning" sufficient to justify the 25% tax imposed several years later? If the Act in effect at the time of making a transfer imposed a tax of 1%, would such Act give "adequate warning" so as to validate a tax of fifty or sixty per cent. under a subsequent statute? Is not the adoption of an Act substantially increasing the rate of tax just as much the adoption of a new and unforeseen law as the enactment of the original statute imposing the tax at the lower rate?

It is submitted that the 1918 Act with its increase in rates applicable to the property here in question of from 10% to 25% and with the various other changes and new features therein contained, was as much a new law as was the Act of September 8th, 1916.

> "The rate of taxation is an indispensable element in the assessment, as much so as the value on which it is to be laid. Without either no assessment can be made.
>
> Let us now go back to the Act of 1916 as amended. The sections of the original Act and of the amending Act which impose the tax each contains as a part thereof the schedules of rates to be applied to the net value of estates in ascertaining the amount of the tax, and declares that the tax imposed equals those percentages. No tax estimated on net value as a basis could be imposed without a rate, nor could an assessment be made if Congress had not fixed the rate,—directly, as it did, or indirectly. The declaration that a tax was imposed on the transfer of the net value of estates would have been meaningless, without a fixed or definitely as-

certainable rate. The fixing of the rates to be applied to the net estate was requisite to imposing the tax, an indispensable element in the imposition." (*Page* v. *Skinner,* 298 Fed. 731, 735; certiorari denied 266 U. S. 625.)

Furthermore, it is submitted that the repeal of the 1916 Act by Section 1400 of the 1918 Act leaves the earlier Act as thoroughly and completely effaced (except with respect to the phases particularly covered by saving clauses) as though it had never existed.

> "The general rule, supported by the best elementary writers is, that 'when an act of the legislature is repealed, it must be considered, except as to transactions past and closed, as if it never existed.'" (*Ex Parte McCardle,* 7 Wall. 506, 514.)
>
> "The general rule is that powers derived wholly from a statute are extinguished by its repeal." (*Flanigan* v. *Sierra County,* 196 U. S. 553, 560.)
>
> "In keeping with this general doctrine the unqualified repeal of a tax act destroys, not only the remedy for the collection of the tax, but as well the liability for the tax, the right to the tax, the tax itself." (*Wilmington Trust Co.* v. *United States,* 28 Fed. (2nd) 205, 206.)

It is obvious that if Section 402(c) can be construed so as to apply to the case at bar, such construction must be based upon the specific clause "whether such transfer or trust is made or created before or after passage of this Act". Were that clause omitted from the Act, the transfer would not be taxable at all. It could not be taxed at the 10% rates imposed by the 1916 Act because that Act, together with the amendatory and supplemental statutes of 1917, had been fully repealed and, as will be later shown,

the saving clause of the repealer was not here applicable. It could not be taxed under the 1918 Act unless, by virtue of the provision above quoted, that Act can be construed with retroactive intendment as to past completed transactions. The issue of constitutionality, therefore, rests squarely upon the validity of a retroactive construction of the 1918 Act irrespective of any prior statutes, whether or not couched in similar phraseology.

POINT VII.

The saving clause contained in Section 1400(b) of the 1918 Act does not operate to impose a tax upon the transaction here in question.

Judge Graham, in his concurring opinion in the Court of Claims, makes the further point, the reasoning in connection with which is not altogether clear, that the tax imposed by the Act of 1916 effective at the time the gift was made, is somehow saved by Section 1400(b) of the 1918 Act, but in such manner as to be taxable at the 1918 rates instead of the 1916 rates (R. 24-25). It is difficult to follow the argument advanced by the Court of Claims in this regard. The provisions of the first sentence of Section 1400(b) of the 1918 Act pertain to remedies and save the right to assess and collect all taxes and penalties which had accrued under the Acts of September 8th, 1916, March 3rd, 1917, and October 3rd, 1917, therein repealed. As respects estate taxes, these provisions applied only in respect of estates of decedents dying prior to the effective date of the 1918 Act, viz., February 24th, 1919, inasmuch as the tax accrues at the time of death. (*Page* v. *Skinner, supra*; *Flannery* v. *Willcuts*, 25 Fed. (2nd) 951; *Hanna* v. *United States*, 68 Ct.

Cls. 45, certiorari denied, 280 U. S. 612.) The proviso respecting Title I of the Revenue Act of 1916 pertains not to the sections here involved, as alleged by the Court of Claims (R. 25), but to income taxes. The second proviso, as above indicated, applies only to estates of decedents dying prior to the adoption of the 1918 Act. The second sentence of subdivision (b) operates solely to prevent a hiatus between the date of adoption of the repealer and the effective date of the tax imposed by the new Act in lieu of the one repealed where the Act provides for an effective date subsequent to the date of adoption of the Act as, for example, in the case of taxes on transportation and insurance under Title V, taxes on admissions and dues under Title VIII, special taxes under Title X and stamp taxes under Title XI.

It is obvious that any saving clause must operate to continue any tax liability under the old Act at the rates imposed by such Act and not at some different and higher rate. It could not "save" a 25% tax when the maximum rate under the old Act was 10%. But no claim is made by the Government that a tax in respect of the transfer here under consideration had accrued under the 1916 Act or should be paid at any rates other than those provided by the Revenue Act of 1918. The most that is claimed is that by virtue of the fact that the 1916 Act, in effect at the time of the gift, purported to tax transfers in contemplation of death, the Government acquired at the time of the transfer an "inchoate" right to tax the transfer under the retroactive provisions of Section 402(c) of the 1918 Act, subsequently adopted.

The Courts, however, have consistently held that vested rights only are saved under a repeal and that inchoate rights and imperfect obligations are destroyed. The effect

of a repeal upon inchoate rights was construed by this Court in *Hertz* v. *Woodman*, 218 U. S. 205, 216:

> "The question for solution must therefore turn upon the inquiry whether the tax in question had been imposed prior to the going into effect of the repealing act within the intent and effect of the saving clause just set out.
>
> There are cases which go so far as to say that the unqualified repeal of a law as effectually destroys rights and liabilities dependent upon it, not past and concluded, as if the statute had never existed. It is, however, putting it strongly enough to say, that an unqualified repeal operates to destroy inchoate rights, as a release of imperfect obligations and as a remission of penalties and forfeitures dependent upon the destroyed statute."

In *Flanigan* v. *Sierra County, supra*, this Court quoted (p. 560) from *Endlich on Statutory Interpretation* as follows:

> "The same rule applies to rights and remedies founded upon statute, and to suits pending to enforce such remedies. If at the time the statute is repealed, the remedy has not been perfected or the right has not become vested, but still remains executory, they are gone."

This rule is stated in *Lewis's Sutherland on Statutory Construction* (2nd Ed.), Vol. I, §284, as follows:

> "A law can be repealed by the lawgiver; but the rights which have been acquired under it while it was in force do not thereby cease. It would be an act of absolute injustice to abolish with a law all the effects which it had produced. This is a principle of general jurisprudence; but a right to be within its protection must be a *vested* right. *It must be some-*

thing more than a mere expectation based upon an anticipated continuance of the existing law.''

In the present case, although the transferor may have thought at the time of making the gift that he was about to die, he did not actually die until years later. It is the Government's contention that an ''inchoate liability'' attached (R. 24) at the moment the transfer was made, which might be taxed under any subsequently enacted statute, irrespective of any intervening events and irrespective of the fact that the death of the transferor, when it did later occur, had no effect upon the transfer or upon the vesting of any interest or benefit in the property in the transferee.

But, as has been shown above, if any ''inchoate liability'' attached at the time of the transfer, it was extinguished by the repeal of the 1916 Act implied in the Act of March 3rd, 1917, and further expressly provided for in the 1918 Act. No tax had accrued under the 1916 Act and since Section 1400(b) of the 1918 Act operated to save accrued taxes only and thus saved estate taxes only in respect of estates of decedents dying prior to February 24th, 1919, no tax against the estate of this decedent was ''saved'' by that Section.

The tax upon the transfer now under consideration, however, cannot be supported except upon this wholly untenable theory. The tax is not upon any interest which passed from the decedent at his death. It is upon an interest transferred by him years prior to death and prior to the passage of the Act imposing the tax. If a tax is to be imposed under the Act adopted subsequent to the transfer it must be upon the theory that the transfer was inherently of such a nature that it might properly be subjected to a tax as a necessary adjunct to enforcing the general

provisions of an estate tax law and that there therefore arose at the time of the transfer an "inchoate liability" to any tax which Congress by subsequent legislation might see fit to impose thereon. It is obvious from the language of the Act that if this theory of the Government be correct and if the tax attaches at all, the Government is also correct in its contention that it attaches irrespective of any events which may have occurred between the time of the transfer and the time of the transferor's death. It would attach even if the transferee had reconveyed the property to the transferor either as a voluntary gift or by way of sale. This produces an anomalous result further illustrating the arbitrary, capricious, and confiscatory nature of the tax previously commented upon.

Assume, for example, a gift of certain securities worth $100,000. The value of the securities subsequently shrinks to $50,000 and the donee sells them to the donor at their then market value. The donor subsequently resells them for $25,000 and reinvests the proceeds in other property. At the time of the donor's death, the value of the securities which were the subject matter of the gift has increased to $200,000. Under the Government's construction of the Act, this $200,000 is included in the decedent's taxable estate as well as the property representing the reinvestment of the $25,000 representing the proceeds of the sale of the securities by the donor.

Or assume that the securities at the time of the gift had a purely nominal value. The donee subsequently voluntarily returns the securities as a gift while the value is still nominal and the donor sells them and dissipates the proceeds, later dying and leaving no assets. The securities by that time have acquired a value of several hundred thousand dollars and the donee, who has received no benefit

from the gift, is taxed under Section 409 of the Act on the basis of that value because of the "inchoate liability" arising out of the donor's frame of mind at the time of the making of the gift and notwithstanding the intervening events, including the retransfer by the donee. And this construction is necessary, according to the Government, in order to enforce the general provisions of the Act and, as asserted by the Court of Claims (R. 20) "makes for equality between taxpayers rather than inequality, which would otherwise exist"!

POINT VIII.

The repeal of the Revenue Acts of September 8th, 1916, March 3rd, 1917, and October 3rd, 1917, coupled with the enactment of the Act of February 24th, 1919, containing analogous taxing provisions, but at different rates, cannot be so construed as to relieve the later Act from the taint of retroactivity when applied to a transfer completed prior to its adoption.

The Court of Claims in its Opinion (R. 22) called attention to the contention of the Government that the repeal of the 1916 Act and the Acts amendatory and supplemental thereto by Section 1400 of the 1918 Act coupled with the simultaneous adoption of a new Act of the same general nature but with changed rates and various other new features added, should not be construed as amounting to a repeal of the old statutes but a continuation thereof with changes. The majority of the Court stated that the conclusions which they had reached made it unnecessary to consider this proposition. Judge Graham, however, to a large extent based his concurring opinion on this ground (R. 26-28). In support of this view he cited *Campbell* v. *California*,

200 U. S. 87; *Steamship Co.* v. *Joliffe*, 2 Wall. 450; *Gulf, etc. Railway Co.* v. *Dennis*, 224 U. S. 503; *Wright* v. *Oakley*, 5 Met. 406, and *Bear Lake, etc. Co.* v. *Garland*, 164 U. S. 1.

It is true that in each of these cases the Court used language which, if entirely dissociated from the facts under consideration, might seem to lend color to the Government's contention in the instant case. An examination of the facts of the several cases, however, shows that in none of them was the decision even remotely applicable to the question here at issue.

Judge Graham mentioned the fact (R. 26) that "The legislation involved in the Campbell case was an inheritance tax law". The similarity of the two cases, however, begins and ends with that fact. In the Campbell case, the issue originally raised was the validity of varying exemptions granted to different classes of relatives under the California Inheritance Tax Law. Judgment on this point was rendered against the estate by the Supreme Court of California and an appeal was taken to the U. S. Supreme Court. While that appeal was pending, the State of California enacted a new law specifically repealing the Act in force at the time of decedent's death and under which the disputed taxes had been assessed. The new issue thereby raised before this Court was whether such a repeal without a saving clause as to taxes accrued under the prior Act had the effect of extinguishing such taxes and thus resulted in making the constitutional question originally raised a moot one. This Court held (p. 93) that the repeal did not have such an effect, that it was the duty of the Court to affirm the decree because of the vested right existing under the earlier Act, and that, as previously held by the Supreme Court of California in the *Estate of Stanford* v. *California*, 126 Cal. 112, the later Act, "in attempt-

ing to abrogate such vested right, was repugnant to specified provisions of the Constitution of California".

The later Act at issue in that case imposed different rates and granted different exemptions from those specified by the earlier Act. There was no attempt, however, to apply the amended provisions retroactively to the case under consideration. The decision went no further than to hold that a vested right to the tax prescribed by the earlier Act accrued to the State upon decedent's death and that the subsequent repeal of that Act while the case was pending before the Supreme Court did not operate to abrogate such vested right notwithstanding the fact that the repealer contained no express saving clause.

The decision in *Steamship Co.* v. *Joliffe, supra,* was to the same effect. In that case, the defendant in error had become entitled to statutory half pilotage fees under the California Act of 1861. Judgment therefore had been rendered in his favor by the State Court and an appeal from that judgment had been taken to this Court. As in the Campbell case, a new statute was enacted during the pendency of the appeal, the new Act containing in substance the same provisions as the earlier law but in terms expressly repealing it. This Court said:

> "When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a *vested right* which stands independent of the statute."

Wright v. *Oakley, supra,* was an action on two bills of exchange which matured in 1826. They were then subject to a six-year statute of limitations so that action was barred

in 1832. Subsequently and in 1835, the Massachusetts statutes were amended and a provision was inserted in the statute of limitations excluding from the computation of time thereunder time during which the defendant was absent from and resided outside the state. Suit was brought in 1839 and if the provisions of the statute as amended could be applied to the situation there would have been no bar to the action. The amendatory statute contained no express repeal of the earlier Act, the repeal being solely one by implication applicable to such provisions of the earlier Act as might be repugnant to those of the later one professing to cover the entire subject. The Court said (p. 410):

> "Here we are inquiring what the Legislature intended by the use of language, *not repealing or professing to repeal the statute* but modifying and continuing it, with a general saving of all rights accruing or accrued, and not affecting any act done; and we are of the opinion, that the Legislature did not intend to take away any right, power or privilege of being protected, for the future, against actions then actually barred by the preexisting law."

Not only was the Act involved in this case one affecting procedure or remedy and not substantive rights, but it will be noted that, so far from holding that the parties were subject to the provisions of the later statute on the theory now advanced by the Government in the case at bar, that because of the "continuing" nature of the legislation the different liabilities provided by the subsequent statute may be imposed, the Court refused to apply the extended period of limitation under the amended Act and held that the right was barred by the earlier law.

Speaking of *Gulf, etc., Railway* v. *Dennis, supra,* Judge Graham in the Court below said (R. 27) that:

> "there was involved a statute containing a simultaneous repeal and reenactment of a prior statute".

As a matter of fact, in the Dennis case there was neither repeal nor reenactment and the language quoted by Judge Graham from the opinion of this Court in the Dennis case (p. 507) refers to the decision in *Steamship Co.* v. *Joliffe, supra.* In the Dennis case the statute provided for the inclusion of attorneys' fees in judgments for damages against railway companies. The Railroad appealed to this Court from a judgment which Dennis had obtained for $75 damages and $20 attorneys' fees. While the appeal was pending, the Supreme Court of Texas adjudged the statute invalid under the State Constitution and the issue was thus raised as to whether the intervening decision of the State Court rendered the Federal question a moot one. This Court said (p. 509):

> "The present case is not one in which the writ should be dismissed, because that would leave the judgment to be enforced as rendered, which the intervening decision shows ought not to be done. Instead of being an obstacle to granting any effectual relief to the plaintiff in error, that decision constitutes in itself an all sufficient ground for relieving it from the attorneys' fee, independently of the Federal question presented on the record; and for reasons before stated. We think it becomes our duty to vacate the judgment so that the State Court may apply the decision by awarding a new judgment in conformity therewith."

Neither in its facts nor in its decision did that case have any application whatsoever to the case at bar.

Bear Lake, etc., Company v. *Garland, supra,* was a suit for the enforcement of a mechanic's lien. The statute in

effect at the time the work was commenced provided that such liens must be filed within 60 days of completion of the contract and that proceedings to enforce them must be taken within 90 days after filing. The statute in effect when the work was completed provided that proceedings to enforce the lien must be commenced within one year from filing. The case decided nothing more than the point that the right to file the lien attached upon the completion of the work and that the time within which the lien must be filed and proceedings thereunder commenced was limited by the Act then in effect and not by the Act in effect at the time the work was begun.

In none of these cases was there any attempt to impose under an amended statute, whether or not such statute contained an express repealing clause of the earlier Act, any greater obligation, liability, or penalty than provided by the earlier law. There is nothing in them nor, it is submitted, in any decision of this Court in any manner lending color to the theory that the repeal under Section 1400 of the 1918 Act of the tax with the maximum 10% bracket here applicable imposed by the 1916 Act, together with the simultaneous enactment of the new law providing for a 25% tax in respect of the same item, can be construed as a mere "continuation" of the prior law.

Nor is the situation as simple as stated by Judge Graham in his opinion below (R. 25):

> "According to the construction presented by the petitioners, we would have this situation, namely, that had the donor died the day before the Act of 1918 became effective there would have been no question of liability, but if he had died the day after the passage of that Act there would be no liability, because the Act of 1916 had been repealed and the liability released thereby."

This statement is not wholly accurate. The 1916 Act in effect at the time of the transfer was prospective only in its application (*Schwab* v. *Doyle; supra; Union Trust Co.* v. *Wardell,* 258 U. S. 537; *Levy* v. *Wardell, supra; Knox* v. *McElligott,* 258 U. S. 546). The amendatory Act of March 3rd, 1917, and the supplemental Act of October 3rd, 1917, likewise contained no language of retroactive import and therefore should similarly be construed as prospective only. Furthermore, since a fixed rate is an indispensable element of an Act imposing a tax (see *Page* v. *Skinner, supra*) and since the provisions of the Act of March 3rd, 1917, imposing new and higher rates of tax are repugnant to the lower rate provisions of the 1916 Act, the later Act repealed the earlier to the extent of such repugnancy as completely as if it had contained an express repealing clause.

> "When there are two acts on the same subject • • • if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first." *United States* v. *Tynen,* 11 Wall. 88, 92.

(See also *Pana* v. *Bowler,* 107 U. S. 529; *Murphy* v. *Utter,* 186 U. S. 95.) Therefore, if the decedent had died after March 3rd, 1917, the transfer in question would not have been taxable because the rates imposed by the 1916 Act had been repealed and the rates imposed by the Act of March 3rd, 1917, admittedly, were prospective only in their application. Even if the amendment of March 3rd, 1917, could be held not to operate as a repeal of the rates imposed by the 1916 Act, the transfer, because of the lack of retroactive intent in the 1917 amendment, would have been taxable in the event of death after March 3rd, 1917, only at the 10% rate provided by the earlier law and not at the 15% rate provided by the later Act.

The Act of October 3rd, 1917, did not provide a substitute rate by way of amendment to the earlier Acts, but imposed an entirely separate tax "in addition to the tax imposed by" the 1916 Act as amended. The rate of such additional tax applicable to the transfer now under consideration substantially in its entirety was 10%. But, as has been stated, this Act, like those of September 8th, 1916, and March 3rd, 1917, contained no retroactive provisions, and therefore under the decision in *Shwab* v. *Doyle, supra,* could not be applied in the present case. Accordingly, if the decedent had died the day before the Act of 1918 became effective, the transfer either would not have been taxable at all, or, at the most, would have been taxable at the 10% rate provided by the 1916 Act, notwithstanding the fact that there were at that time in effect Acts imposing a tax in the aggregate amount of 25%.

The Government claims that the effect of the 1918 Act, repealing all three of the prior Acts and adopting a new statute providing tax brackets differing from all the prior statutes and embodying numerous new provisions, including the retroactive phraseology of Section 402(c), was to assemble the Act of September 8th, 1916, previously repealed by implication, the Act of March 3rd, 1917, which never applied to the transfer at issue, and the Act of October 3rd, 1917, which likewise could by no possibility have applied to such transfer, and to "continue" them into the new law so as to impose upon the transfer a tax equivalent to the aggregate amount provided under the three prior and inapplicable Acts. And the Court of Claims was of the opinion (R. 26) that "this construction imposed no hardship upon the estate"!

Conclusion.

In conclusion, it is submitted that the gift of 2,713 shares of the capital stock of Minot Mills, Inc. made by the decedent to his three children in December, 1916, did not constitute a part of his estate at the time of his death March 5th, 1920, and was not taxable under the provisions of the Revenue Act of 1918; that Section 402(c) of the Revenue Act of 1918 does not purport to tax such gift and, if so construed as to impose a tax, is in violation of the due process clause of the Fifth Amendment to the Constitution of the United States and further amounts to an unapportioned direct tax forbidden by Sections 2 and 9 of Article I of the Constitution. It is accordingly submitted that the judgment of the Court of Claims should be reversed and judgment should be entered against the United States of America in the sum of $812,162.42, together with interest thereon from the 10th day of March, 1926, and costs.

Respectfully submitted,

D. A. Embury,
Attorney for Petitioners,
Office & Post Office Address:
63 Wall Street,
Borough of Manhattan,
City of New York.

Hugo Kohlmann,
Curtis, Mallet-Prevost, Colt & Mosle,
Of Counsel.

Appendix.

Act of September 8, 1916.
(39 Stat. 777-778)

Sec. 201. That a tax (hereinafter in this title referred to as the tax), equal to the following percentages of the value of the net estate to be [fol. 3] determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States:

(Here follows a table showing the rates of tax beginning at 1% on the amount of the net estate not in excess of $50,000. and running up to 10% on the amount in excess of $5,000,000.)

Sec. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated:

* * * * * *

(b) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

Act of March 3, 1917.
(39 Stat. 1002)

Sec. 300. That Section 201, Title II, of the Act entitled "An Act to increase the revenue, and for other purposes" approved September eighth, nineteen hundred and sixteen, be, and the same is hereby amended to read as follows:

> "Sec. 201. That a tax (hereinafter in this title referred to as the tax), equal to the following percentages of the value of the net estate, to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States:"
>
> (Here follows a table showing the rates of tax beginning at 1½% on the amount of the net estate not in excess of $50,000. and running up to 15% on the amount in excess of $5,000,000.)

Sec. 301. That the tax on the transfer of the net estate of decedents dying between September eighth, nineteen hundred and sixteen, and the passage of this Act shall be computed at the rates originally prescribed in the Act approved September eighth, nineteen hundred and sixteen.

Act of October 3, 1917.
(40 Stat. 324-325)

Sec. 900. That in addition to the tax imposed by section two hundred and one of the Act entitled "An Act to increase the revenue, and for other purposes", approved September eighth, nineteen hundred and sixteen, as amended—

(a) A tax equal to the following percentages of its value is hereby imposed upon the transfer of each net estate of every decedent dying after the passage of this Act, the transfer of which is taxable under such section (the

value of such net estate to be determined as provided in Title II of such Act of September eighth, nineteen hundred and sixteen):

(Here follows a table showing the rates of tax beginning at ½ of 1% on the amount of the net estate not in excess of $50,000. and running up to 10% on the amount in excess of $10,000,000.)

Act of February 24, 1919.

(Revenue Act of 1918)

(40 Stat. 1096-1101, 1149)

Sec. 401. That (in lieu of the tax imposed by Title II of the Revenue Act of 1916, as amended, and in lieu of the tax imposed by Title IX of the Revenue Act of 1917) a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States:

(Here follows a table showing the rates of tax beginginning at 1% on the amount of the net estate not in excess of $50,000. and running up to 25% of the amount in excess of $10,000,000.)

Sec. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated.

* * * * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money

or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title:

Sec. 409. * * *

If (a) the decedent makes a transfer of, or creates a trust with respect to, any property in contemplation of or intended to take effect in possession or enjoyment at or after his death (except in the case of a bona fide sale for a fair consideration in money or money's worth) or (b) if insurance passes under a contract executed by the decedent in favor of a specific beneficiary, and if in either case the tax in respect thereto is not paid when due, then the transferee, trustee, or beneficiary shall be personally liable for such tax, and such property, to the extent of the decedent's interest therein at the time of such transfer, or to the extent of such beneficiary's interest under such contract of insurance, shall be subject to a like lien equal to the amount of such tax. Any part of such property sold by such transferee or trustee to a bona fide purchaser for a fair consideration in money or money's worth shall be divested of the lien and a like lien shall then attach to all the property of such transferee or trustee, except any part sold to a bona fide purchaser for a fair consideration in money or money's worth.

Sec. 1400. (a) That the following parts of Acts are hereby repealed, subject to the limitations provided in subdivision (b):

(1) The following titles of the Revenue Act of 1916:

* * * * * *

Title II (called "Estate Tax");

* * * * * *

(2) The following parts of the Act entitled "An Act to provide increased revenue to defray the expenses of the increased appropriations for the Army and Navy and the

extensions of fortifications, and for other purposes," approved March 3, 1917;

Title III (called "Estate Tax");

* * * * * * *

(3) The following titles of the Revenue Act of 1917:

* * * * * * *

Title IX (called "War Estate Tax");

* * * * * * *

(b) Such parts of Acts shall remain in force for the assessment and collection of all taxes which have accrued thereunder, and for the imposition and collection of all penalties or forfeitures which have accrued and may accrue in relation to any such taxes, and except that the unexpended balance of any appropriation heretofore made and now available for the administration of any such part of an Act shall be available for the administration of this Act or the corresponding provision thereof: *Provided,* that, except as otherwise provided in this act, no taxes shall be collected under Title I of the Revenue Act of 1916, as amended by the Revenue Act of 1917, or Title I or II of the Revenue Act of 1917, in respect to any period after December 31, 1917; *Provided, further,* that the assessment and collection of all estate taxes and the imposition and collection of all penalties or forfeitures, which have accrued under Title II of the Revenue Act of 1916 as amended by the Act entitled "An Act to provide increased revenue to defray the expenses of the increased appropriations for the Army and Navy and the extensions of fortifications, and for other purposes," approved March 3, 1917, or Title IX of the Revenue Act of 1917, shall be according to the provisions of Title IV of this Act. In the case of any tax imposed by any part of an Act herein repealed, if there is a tax imposed by this Act in lieu thereof, the provision imposing such tax shall remain in force until the corresponding tax under this Act takes effect under the provisions of this Act.

* * * * * * *